Office-Supreme Court, U.S.
FILED
DEC 11 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 519

BEBRY BEDDING CORPORATION,
Petitioner,
vs.
CASTRO CONVERTIBLE CORPORATION,
Respondent.

R. H. MACY & CO., INC.,
Petitioner,
vs.
CASTRO CONVERTIBLE CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL L. MORRIS
CURTIS, MORRIS & SAFFORD
530 Fifth Avenue
New York 36, New York
Attorney for Respondent

ROBERT D. SPILLE
JOHN A. MITCHELL
New York, New York
Of Counsel

INDEX

	PAGE
Foreword	1
Statute Involved	2
The "Questions Presented" Do Not Arise	2
Question 1	2
Question 2	2
Question 3	3
Statement of the Case	3
Argument	5
Conclusion	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

BEBRY BEDDING CORPORATION, *Petitioner,* vs. CASTRO CONVERTIBLE CORPORATION, *Respondent.*	No. 519
R. H. MACY & CO., INC., *Petitioner,* vs. CASTRO CONVERTIBLE CORPORATION, *Respondent.*	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Foreword

No one of the "Questions Presented" by the petition (P. 2-3) arises from the record in this case. Each question involves a false factual predicate, contrary to the concurring findings of both courts below. The courts below applied accepted principles and rules of patent law to the credible evidence before them. The "Questions Presented," insofar as they are comprehensible, are purely artificial and contrary to the issues as decided below.

Statute Involved

In addition to 35 U. S. C. Sections 102-103 which are set forth in Appendix D of the Petition, the following statute is involved:

> **35 U. S. C. § 282. Presumption of Validity; defenses.** A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

* * * * *

The "Questions Presented" Do Not Arise

Question 1

Question 1 presupposes that the courts below made some sort of an "admission" as to what was the alleged novel element of respondent's patented structure and then in the same breath declared such element "not new" and obvious to an ordinary mechanic. Neither the concurring opinions below nor the record supports such semantic juggling on the part of petitioner. Nowhere in the petition can one find documentation as to where this imaginary "admission" took place. Petitioner blithely asserts, without evidence, that it "is beyond dispute that the only assertable point of novelty" in the involved Creveling patent is what petitioner contends. There is simply no support for this assertion by petitioner and the opinions below amply refute petitioner's contention.

Question 2

Question 2 is simply Question 1, restated in less comprehensible form.

Question 3

Question 3 is artificial and assumes that the courts below applied different standards of interpretation on the issues decided. The record shows that the Creveling patent claims were given the same interpretation on the issue of validity as given on the issue of infringement.

Statement of the Case

This case presents the ordinary, usual issues of a patent infringement action. No novel or unsettled questions of patent law were raised or decided. The District Court devoted 5 full days to the trial, heard 11 witnesses testify (including expert witnesses for each side), considered lengthy briefs as well as comprehensive findings proposed by both sides and entered its judgment and findings only after extensive oral argument for reconsideration by petitioners. The trial court also observed motion pictures and courtroom demonstrations of the patented and infringing structures before it. The majority of the Court of Appeals noted that the case involved disputed technical and mechanical questions and that "The resolution of these technical and mechanical questions must, of necessity, be within the realm of expert testimony." It pointed out that the trial judge had properly accepted the testimony of respondent's expert witness whom he had found to be truthful and highly skilled in the art and, equally properly, had refused to rely on certain testimony of petitioners' expert and other key witnesses whom he had found to be "unpersuasive" or "unconvincing".

The statement of facts is best set forth in the opinion of the Court of Appeals. Suffice it to say that petitioners' version of the facts is quite distorted as compared with the findings below.

For example the petition (pp. 3-4) glosses over the basic facts of the case by stating: "Unfortunately, the origins of the patents involved below were enmeshed in certain contractual, business, and in fact even personal relationships between the parties hereto." This euphemistic statement falls far short of the truth.

The record shows, as restated in the opinions and findings below, that petitioners' Mr. Bebry had scoffed at the idea of the Creveling ottoman bed and had refused to manufacture it for respondent's Bernard Castro until petitioner was guaranteed against the possibility of loss (Appendix A, p. 93a). As soon as Bebry appreciated the inventive and commercial value of the Creveling structure he stealthily tried to patent it himself (Appendix A, pp. 93a-94a). Meanwhile petitioner, R. H. Macy & Co., a nationwide retailer and competitor of Castro, had tried to sell a non-folding ottoman bed without too much success (Appendix A, p. 94a). As soon as the Castro-Creveling ottoman bed appeared on the market, Macy's was anxious to buy it (Findings 20, 21, Appendix A, p. 32a) and finally did so. This result was not too unexpected since Mr. Bebry had previously (and unsuccessfully) tried to persuade Bernard Castro not to pay royalties on the Creveling invention to Mrs. Creveling, the inventor (Appendix A, pp. 16a-17a). With such a history of deceit and double-dealing, perhaps it should have been foreseen that Bebry would also break his agreement with Castro

and manufacture the Castro-Creveling ottoman bed for Macy's—potentially a more profitable source of business for Bebry.

Argument

This is not a case involving an important issue of constitutional law or even a difficult question of statutory interpretation on which the lower courts need guidance. There is no diversity of opinion between circuits on the Creveling patent in suit, there is no conflict with any decision of this Court, there has been no departure from established judicial procedure and there is no question of public importance to be resolved.

Instead, this is just another case in which disgruntled losing parties want another hearing before another tribunal to further postpone the day of reckoning when they must account for an infringement held to be "deliberate and wilful" (Appendix A, p. 36a, Conclusion of Law 3).

The courts below were not only aware of the equitable aspects of this controversy but also carefully considered the same technical arguments once again advanced by petitioners.

For example, petitioners argue that their copy of the Castro-Creveling invention does not infringe and that the Creveling patent is invalid. No longer do they contend that Bebry had obtained a valid patent for himself. Such a contention is impossible in view of the finding below that petitioners' expert had "conceded that the objects or purposes of the Bebry patent were achieved by the original Creveling model and that Bebry's claims covered it. (R 602-607)" (Appendix

A, p. 18a). The courts below thus applied the axiom of patent law that a structure which, if later, infringes, if earlier, is an anticipation. By conceding that the claims of the Bebry patent covered the earlier model of Creveling, petitioners' expert, in substance, admitted that the Bebry patent is invalid. He also admitted that petitioners' copy of the earlier Creveling model and patent was an infringement.

Petitioners' expert thus agreed on these two key issues with respondent's expert Willis. The District Court summed up the further evidence of infringement as follows (Appendix A, p. 20a):

> "Plaintiff's expert, Willis, highly experienced in this field, well sums up the credible evidence that the criss-cross legs are an extended toggle; that the principle of operation of the criss-cross legs and the Creveling toggle is the same, i.e., to raise the inner section of the ottoman bed to the sleeping position (R. 58-73). While Bebry did not copy Creveling in every detail, such as substituting criss-cross legs for the Creveling toggle, he devised a bed for the doing of the same work as Creveling and thus accomplished substantially the same result. This constitutes infringement. Graver Tank & Mfg. Co. Inc. *v.* Linde Air Products Co., 339 U.S. 605, 607. Bebry's substitution was a distinction without a difference. This was further demonstrated in the hair-splitting testimony of defendant's expert Hughes, when called upon to define a toggle. Even he was unable to distinguish between the effect of the cross legs and the toggle."

Far from departing from this Court's admonitions on how to interpret patent claims, it is clear that the courts below relied on the most recent decision of this

Court on the subject, and correctly applied it to the evidence before them.

So much for infringement.

On the issue of validity, petitioners have retreated substantially from their arguments below that a large number of prior art patents disclose the Castro-Creveling ottoman bed. As noted by the District Court, petitioners once asserted that twenty-two old patents disclosed the invention in issue. At the trial, petitioners urged that 4 patents to Freedman (1918), DeDoes (1918), Lamb (1928) and Frank (1934) showed respondent's invention. Now, petitioners pin all their hopes on two of these four (Petition, pp. 6-10).

First of all neither of these patents shows, or is even asserted to show, an ottoman bed. Indeed, petitioners are driven to the stage of mentally re-combining and re-constructing bits and pieces of these last-straw patents and then arguing that this sort of mental gymnastics would have been obvious to those skilled in the art. This approach was rejected by both courts below which found that one of petitioners' officials gave testimony which was "persuasive evidence that the ottoman was not obvious even to those closely allied with the bed business" (Appendix A, p. 95a). In further refutation of petitioners' argument is the fact that both courts found "these patents were not anticipatory and that there was no evidence that any of them had or could have functioned in actual operation" (Appendix A, p. 94a).

Not only was there no evidence of operability of these two patents but petitioners' own expert "Hughes,

doubted their operability without substantial re-design" (Appendix A, p. 18a). Thus petitioners' specious argument that anyone could have come up with the Castro-Creveling invention after perusing the Frank and Freedman patents flies in the teeth of the evidence, including testimony from two of petitioners' own witnesses.

Conclusion

The judgment below is free of error, supported by the credible evidence and the petition should be denied.

Respectfully submitted,

DANIEL L. MORRIS
CURTIS, MORRIS & SAFFORD
530 Fifth Avenue
New York 36, New York
Attorney for Respondent

ROBERT D. SPILLE
JOHN A. MITCHELL
New York, New York
Of Counsel